Supreme Court, U.S.
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No._____

In The
Supreme Court of the United States
October Term, 1995

LAWRENCE NEUMANN,
Petitioner

v.

THOMAS PAGE, WARDEN
Respondent

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the lower courts should have granted a hearing to ventiliate a claim of racial discrimination in the jury selection process, made pursuant to *Swain v. Alabama*, 380 U.S. 202 (1965), when the petitioner's pleadings were supported by the affidavits of a number of local petitioners who had pooled their collective knowledge of the circumstances in Cook County, Illinois and who had concluded that their collective knowledge demonstrated that systemic discrimination existed.

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PETITION FOR WRIT OF CERTIORARI

Lawrence Neumann respectfully petitions this Court for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Seventh Circuit.

OPINIONS AND ORDER BELOW

The opinions of the appellate and district courts are unreported. They are reprinted at App. A1-A5, B1-B19.

JURISDICTION

The court of appeals issued its opinion on February 28, 1996 and judgment was entered on that same date. This petition is being submitted within the time permitted by the Rules of this Court. This Court has jurisdiction pursuant to 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves a claim that the State of Illinois violated the Sixth Amendment's guarantee to a petit jury composed of a fair cross section of the community, as incorporated through the Fourteenth Amendment. The case also involves a claim of a violation of the Fourteenth Amendment's Equal Protection Clause.

These constitutional sections are set out verbatim:

Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously

> ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment, Section 1:

> All persons born or naturalized in the United States and subject tot he jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Statement of the Facts

1. The Underlying Crime.

On September 16, 1983, petitioner was convicted in the Circuit Court of Cook County, Illinois of murder, murder while committing armed robbery, and murder while committing burglary. (App. at B2). Petitioner is presently natural life and is in the Correctional Center in Menard, Illinois. (App. at B2).

2. The Direct Appeals and Post Conviction Remedies.

The petitioner appealed his conviction to the Illinois Appellate Court. (App. at B3). The issue raised by the instant petition to this Court was not raised as part of the direct appeal. (App. at B3). On August 27, 1986, the petitioner conviction and

sentence were affirmed. *People v. Neumann*, 148 Ill. App. 3d 362, 499 N.E.2d 487 (1st Dist. 1986). (App. at B3).

The petitioner subsequently sought leave to appeal to the Illinois Supreme Court. (App. at B2). The Illinois Supreme Court denied the petitioner's request on February 6, 1987. (App. at B3). This Court subsequently denied certiorari. *People v. Neumann*, 113 Ill. 2d 581, 505 N.E.2d 359, *cert. denied, sub. nom. Neumann v. Illinois*, 481 U.S. 1051 (1987). (App. at B3).

The petitioner did not seek post-conviction relief pursuant to the Illinois Post-Conviction Act. (App. at B3) 725 ILCS 5/122-1 through 122-8. The time to seek any such remedy has now expired. 725 ILCS 5/122-1.

3. The Basis for the Habeas Corpus Action.

Petitioner filed a habeas corpus petition in the United States District Court for the Northern District of Illinois, pursuant to 28 U.S.C. 2254. (App. at B4).

The petition claimed that the petitioner, who is white, was deprived of a fair trial because African-Americans had been systematically excluded from the petit jury. (App. at B4). The petitioner's claim was based upon *Swain v. Alabama*, 380 U.S. 202 (1965). (App. at B4).

There were three specific factual claims: (App. at B4-B5)

1. During the jury selection process, the prosecutor informed the defense attorney that the prosecutor intended to excuse all African-Americans who were in the venire.

2. The prosecutor in fact used his peremptory challenges to excuse eleven African-Americans.

3. At the time of petitioner's trial, Cook County prosecutors commonly and systematically used peremptory challenges to dismiss potential jurors based on their race.

These claims were supported by an affidavit from petitioner's trial counsel and by affidavits from a number of local criminal defense attorneys. (App. at B4). These affidavits are included in the Appendix. App. C.

The affidavit of petitioner's trial counsel affirmed the prosecutor's comments made prior to jury selection. (App. at B4). The trial counsel's affidavits and the affidavits of the other local practitioners averred that it was a common practice at the time of petitioner's trial for Cook County, Illinois prosecutors to exclude African-Americans from jury panels for racially based reasons. App. C.

Petitioner sought a hearing at which these claims could be further developed. (App. at B6). Another purpose for seeking a hearing was to demonstrate "cause" for why this claim was not raised as part of petitioner's direct appeals. App. at B5.

B. The Decisions of the Courts Below

The district court denied the petition without a hearing. A copy of that unreported decision is reprinted in the appendix. App. at B1-B19.

The basis for the denial was the following:

1. The district judge concluded that the petitioner had exhausted his state court remedies because post-conviction relief was no longer available in Illinois at the time that the habeas petition was filed. (App. at B7).

2. However, the district judge also concluded that the petitioner had procedurally defaulted on the *Swain* claim because he did not raise these claims during his direct appeals. (App. at B7-B8).

3. The judge further concluded that the petitioner had not demonstrated reasonable cause for his procedural default. (App. at B9-B10).

4. Specifically, the district judge concluded that there was a legal basis for the discrimination claim in 1983 when the defendant was tried. (App. at B10-B16). The judge opined that the combination of *Swain v. Alabama*, 380 U.S. 202 (1965) and *Peters v. Kiff*, 407 U.S. 493 (1972) supported the type of claim which the petitioner was making. App. at B16.

5. *Swain* held that the defendant could establish an equal protection violation by showing a systemic use of peremptory challenges to exclude African-Americans from the venire. App. at B10-B11.

6. *Peters*, a plurality decision , stated that "racial discrimination in the jury selection process cannot be tolerated and that the race of the defendant has no relevance to his or her standing to raise the claim". 407 U.S at 504-505. App. at B11-B12.

7. The district judge noted *Batson v. Kentucky*, 476 U.S. 79 (1986) which overruled *Swain* with respect to *Swain's* requirement that a showing of systemic discrimination must be made. In *Baston*, this Court held than an equal protection claim could be based solely on events which took place during the defendant's own trial. App. at B11.

8. The district judge also noted *Powers v. Ohio*, 499 U.S. 400 (1991) which held that a defendant has the right to challenge racially based exclusion of jurors even though the jurors excluded are of a different race than the defendant. App. at B12.

9. The district judge concluded, however, that neither *Baston* nor *Powers* applied to the petitioner because neither

decision was retroactive and because the petitioner's direct appeal process had ended prior to the decision in either case. App. at B13.

10. The district judge then cited a Seventh Circuit decision for the proposition that it was law in the Seventh Circuit that a white defendant had standing to challenge the exclusion of jurors of another race. App. at B12. The case, however, involved a federal rather than a state inmate. *United States v. Gometz*, 730 F.2d 475 (7th Cir. 1984) (*en banc*).

11. From these cases, the district judge concluded that there was a sufficient legal basis available for the petitioner to have brought his claims at an earlier date. App. at B13.

12. The district judge then considered whether there was a factual basis for the *Swain* claim. (App. at B16-19).

13. The district judge concluded that there was a factual basis for a *Swain* claim which was available at the time of the state proceedings. App. at B16-19.

14. Specifically, the judge cited the following factors: App. at B17-19.

A. The facts that form the basis of the petitioner's factual claims were available at the time of the state proceedings.

B. This assertion is justified because the affiants stated "I believed then and now that racial discrimination was the reason for the practice [of excluding African American jurors]".

C. Petitioner's trial counsel should have attempted to gather evidence of systemic discrimination and should have introduced that evidence during the course of the petitioner's trial.

D. Petitioner's trial counsel could have sought leave to introduce evidence that would have met *Swain*.

E. Petitioner's trial counsel could have sought a continuance of the trial to gather *Swain* related evidence.

15. The judge then concluded that a combination of the availability of a legal remedy and the availability of facts demonstrated that there was no cause for the procedural default. (App. at B17-B18). The petition was denied without a hearing. The district judge did not reach the prejudice question because of his decision about cause. App. at B17-B18.

Petitioner duly appealed this decision to the United States Court of Appeals for the Seventh Circuit.

The Seventh Circuit affirmed the district judge in an unreported opinion. This opinion is reprinted in the appendix at A1-A5.

The Seventh Circuit agreed with the district court that a combination of *Swain v. Alabama*, 380 U.S. 202 (1965), *Powers v. Kiff*, 407 U.S. 493 (1972), and *United States v. Gometz*, 730 F.2d 475 (7th Cir. 1984) (*en banc*) provided a sufficient basis for the petitioner to have made a legal claim at the time that the petitioner's state proceedings were pending. (App. A3).

As to the factual issue, the Seventh Circuit pointed to the same "then and now" language relied upon by the district court to conclude that the evidence was available at the time that the petitioner's case was litigated. (App. at A4). The Seventh Circuit cited *Engle v. Isaac*, 456 U.S. 107, 134 (1982) for the proposition that "[w]here the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default".

App. at A4-A5.

REASONS FOR GRANTING THE WRIT

A. An Important Constitutional Question is Raised Regarding the Use of Peremptory Challenges to Exclude African Americans From The Jury Venire. An Important Question is Also Raised Regarding The Procedure for Establishing a *Swain* Claim and Whether Petitioner Was Properly Denied a Hearing on his Claim.

For purpose of this petition, it is unquestioned that the petitioner's prosecutor deliberately excluded African Americans from the venire solely on the basis of race.

Petitioner also submits that had his case arisen after 1991, he would have been entitled to relief under the principles of *Baston v. Kentucky*, 476 U.S. 79 (1986) and *Powers v. Ohio*, 499 U.S. 400 (1991) because his Equal Protection rights under the Fourteenth Amendment would have been violated.

However, because *Baston* and *Powers* were not retroactive, petitioner was faced with the daunting task of establishing a systemic violation under *Swain v. Alabama*, 380 U.S. 202 (1965).

For almost two years, petitioner's counsel made efforts to identify members of the Illinois criminal defense bar who had been practicing in Cook County, Illinois in 1983 and who might have experienced racially discriminatory acts by prosecutors during the jury selection process.

At the end of this extensive effort, the petitioner's counsel was able to identify a number of practitioners who could attest to racial discrimination in Cook County and who could testify about

that discrimination on petitioner's behalf.

An single affidavit was prepared for all of the practitioners to sign. These affidavits are reprinted in the Appendix at App. C.

Each affidavit contained the following paragraph:

> On the basis of my own personal experience I can state that at that time, it was very common for the prosecutors in Cook County to exclude African Americans from juries. I believed then and now that racial discrimination was the reason for the practice. The effect of this practice was systemic exclusion of many African Americans from the jury experience.

The purpose of this paragraph was to demonstrate that the affiant had observed racially discriminatory acts in 1983 when the petitioner was being tried and to further indicate that the affiant still held the belief at the time that the affidavit was executed that racial discrimination had occurred..

At the threshold, petitioner respectfully submits that the lower courts erred when they seized upon the "then and now" language to support the conclusion that the evidence necessary to mount a *Swain* challenge was available to the petitioner at the time of his trial.

In the first instance, there are a number of possible interpretations that might be given to the phrase "then and now". One interpretation might support the meaning petitioner's counsel intended to convey when the affidavits were drafted; another spin might support the conclusion reached by the lower courts or possibly other interpretations in between that advocated by petitioner and that utilized by the lower courts in reaching their decision.

However, petitioner submits that this type of issue is a

factual matter which should have been resolved by hearing. Had such a hearing been held, the practitioners could have explained the meaning of the affidavit and also the extent of the knowledge that they had in 1983. They could also have explained why this collective knowledge was not available to any single one of them during the relevant time frames. In effect, the lower court judges substituted their opinion of the wording for the intent of the affiant in order to preclude the petitioner from litigating his meritorious claim.

Thus, petitioner respectfully submits that it was error to decide this petition without a hearing. This is particularly true since the issues at hand were not ventilated at any state court hearing. *Cf., United States ex rel. Shore v. O'Leary*, 833 F.2d 663 (7th Cir.. 1987) (federal hearing not mandated when the defendant had received a full and fair hearing in state court); *Johnson v. Wyrick*, 381 F. Supp. 747 (W.D. Mo. 1974), *aff'd*, 508 F.2d 123 (8th Cir. 1974) same).

There are several other factors which point out the error below and the manifest injustice which was done by preventing the petitioner from fleshing out his *Swain* claim:

1. *Swain* itself makes clear that the testimony of a single attorney is insufficient to establish systemic discrimination.
2. Two Eleventh Circuit cases have held, however, that the collective testimony of numerous practitioners can support a claim of systemic discrimination. *Jones v. Davis*, 834 F.2d 835 (11th Cir. 1988); *Love v. Jones*, 923 F.2d 816 (11th Cir. 1991).
3. In this case, the problem was that before petitioner's counsel collected the affidavits, the affiants had never pooled their knowledge and were thus unaware that the discrimination problem was systemic rather than limited to each practitioners individual experience.
4. Thus, the collective knowledge which was necessary to establish systemic discrimination was not known to the affiants or to the petitioner. This excusable lack of factual knowledge

constitutes cause for the petitioner's procedural default.

5. The lower courts in the instant case conducted a superficial analysis when they assumed that all of the affiant shared their collective knowledge in 1983. The assumption is not only illogical, but it is simply not true.

6. The lower courts also erred when they suggested that petitioner could have easily gotten a continuance or made a trial record about systemic discrimination.

7. As to a continuance, the petitioner did contemporaneously object to the prosecutor's use of peremptory challenges. That objection was overruled.

The petitioner did not have any evidence of systemic discrimination, and at the time of petitioner's trial, evidence of discrimination in the petitioner's case alone was under *Swain*.

Thus, if the petitioner had tried to get a continuance, there would have been no basis for the request. Any such request would have been based upon a request to conduct a "fishing expedition". It is not reasonable to conclude that a continuance was a viable option.

It was also unreasonable to conclude that petitioner could have introduced evidence of systemic discrimination during the trial. The petitioner did not have the evidence and could not have acquired it during the heat of a murder trial. Moreover, such evidence was not germane to the issues involved with the underlying case. Thus, even if there was some evidence of systemic discrimination, there was no assurance that such evidence would have been deemed admissible by the Circuit Judge.

Finally, it took the petitioner almost two years to identify practitioners and to reduce their collective experience to affidavits. There is no reason to expect that petitioner could have acquired the information in less time in 1983 and no reason to believe that any Circuit Judge would have delayed a murder trial so that a speculative effort to gather evidence could have been made.

8. Petitioner also submits that the Seventh Circuit's reliance upon *Engle v. Isaac*, 456 U.S. 107 (1982) was misplaced.

In this case, none of the affiants had ever successfully

litigated a *Swain* claim based upon the conduct of Cook County prosecutors. Indeed, petitioner is not aware of any successful *Swain* claim brought against the prosecutors practicing in the Circuit Court of Cook County, Illinois. To the contrary, the reported cases consistently held that that the defense bars attempts to show systemic discrimination were inadequate. *See, e.g., People v. Payne*, 99 Ill. 2d 135, 457 N.E. 2d 1202 (1983); *People v. Gaines*, 105 Ill.2d 79, 473 N.E.2d 868 (1984); *People v. Mack*, 105 Ill. 2d 103, 473 N.E.2d 880 (1984); *People v. Hartfield*, 232 Ill. App. 3d 198, 596 N.E. 2d 703 (1st Dist. 1992).

This fact bolsters petitioner's position that the defense bar of that time did not have the collective information available to mount a successful *Swain* claim.

Moreover, these are issues which should have been resolved by hearing. As argued *supra*, it was simply unfair to use a skewed reading of the affidavits to ignore the fact that each and every affiant stated facts which, if proved, would have entitled the petitioner to relief even under the rigorous standards of *Swain*.

For all these reasons, petitioner respectfully submits that he met the cause prong of the "cause and prejudice" analysis mandated by this Court in a case such as *Coleman v. Thompson*, 501 U.S. 722 (1991).

"Cause" is found because the factual predicate for a *Swain* claim was not reasonably available because while the practitioners might have had individual knowledge about their own experiences, they did not have collective knowledge about the experiences of other practitioners. Since that collective knowledge was necessary to make a *Swain* claim, the petitioner's failure to raise the issue in the state court system should be excused.

Moreover, as argued *supra*, it was unreasonable to conclude that petitioner could have found sufficient evidence to

include in the record for a direct appeal. Thus the failure to raise the issue during the direct appeal is excusable for the simple reason that an appellate court will not consider issues not part of the lower court record.

Finally, after the direct appeals were concluded, the petitioner was unrepresented and incarcerated in a maximum security prison. His failure to gather evidence is most understandable given his situation.

For all of these reasons, the petitioner respectfully argues that he had a sufficient basis for a *Swain* claim and that a hearing should have been held to ventilate his claim.

Petitioner respectfully requests this Court to grant the requested writ so that this meritorious claim is not lost.

B. The decision of the Seventh Circuit Conflicts With Eleventh Circuit Decisions and With a Decision Within the Seventh Circuit Itself. Accordingly, It Would Be Additionally Appropriate to Grant Certiorari So That These Conflicts Can Be Harmonized.

The Eleventh Circuit has on two recent occasions addressed the evidentiary base which is necessary to support a successful *Swain* claim. *Love v. Jones*, 923 F.2d 816 (11th Cir. 1991) and *Jones v. Davis*, 834 F.2d 835 (11th Cir. 1988).

In both cases, the Court was called upon to determine whether the collective experiences of local practitioners were appropriate grounds for a *Swain* challenge. The Eleventh Circuit concluded that such experiences were proper, while at the same time suggesting that a smaller group of practitioners would not be enough to establish a claim of systemic discrimination.

Petitioner's counsel was aware of these two cases when the habeas petition in this case was prepared. Because successful

Swain challenges are so rare, counsel tried to structure the instant petition along the model approved by the Eleventh Circuit.

For these reasons, Petitioner respectfully suggests that Seventh Circuit's approach is in conflict with that approved by the Eleventh Circuit and that the writ should be granted to resolve that conflict.

In *Harris v. DeRobertis*, 932 F.2d 619 (7th Cir. 1991), the Seventh Circuit addressed a cause and prejudice question and addressed whether a petition should be dismissed because there was an available procedure available under state law which had not been attempted by the petitioner. In analyzing the question, the Court noted that the procedure had not resulted in a successful claim in over 40 years.

The Court concluded that a defendant should not be required to pursue a theoretical remedy which had never resulted in a practical success. As a result, the Court held that cause had been shown for the petitioner's failure to raise an issue in the state court system.

In the instance case, not only had petitioner's objection to the prosecutor's preemptory challenges procedure been overruled, but it was very unlikely that petitioner could have convinced a court to grant a continuance or supplement the record given the singular lack of success in raising a *Swain* challenge in Cook County, Illinois.

It would thus, be appropriate for this Court to accept the instant petition so that this issue and conflict can be resolved.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and set this case for plenary consideration.

May 28, 1996

Respectfully submitted,

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LAWRENCE NEUMANN,

Petitioner-Appellant,

v.

Thomas Page, Warden, Menard Correctional Institute,

Respondent-Appellee.

No. 94 C 3498

United States Court of Appeals, Seventh Circuit.

February 28, 1996,

ORDER

Before H. WOOD, JR, ESCHBACH, and D. WOOD, Circuit Judges.

Petitioner Lawrence Neumann, an inmate at the Menard Correctional Center in Illinois, appeals the denial of his petition for a writ of habeas corpus pursuant to 28 U.S.C. 2554. Following a jury trial in 1983, petitioner was convicted of murder, murder while committing armed robbery, and murder while committing burglary. He was sentenced to life imprisonment. The underlying

facts are found in the Illinois Appellate Court opinion which affirmed petitioner's conviction and sentence.[1]

Now, fifteen years after the crime and eleven years after his conviction, petitioner brings this action in order to raise a jury selection claim. At issue in this proceeding is petitioner's allegation that Cook Country prosecutors systematically excluded African-Americans from jury panels, including petitioners jury, in violation of the Sixth and Fourteenth Amendments to the Constitution. Petitioner is a Caucasian.

The jury issue was not, however, raised in petitioner's state court trial or direct appeals. Furthermore, petitioner acknowledges that he may no longer file for post-conviction relief in state court as the statutory limitation period has expired. 725 ILCS 5/122-1. As the district court recognized, however, petitioner may overcome his procedural default if he is able to show cause for the default and actual prejudice as a result of the alleged violation of federal law. *Mills v. Jordan*, 979 F.2d 1273. 1277 (7th Cir. 1992) (citation omitted).

In an effort to show cause, petitioner claims that, during the course of his state court proceedings, the factual and legal bases upon which he bases this present action were nonexistent or overly "murky." The district court rejected this argument after

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[1]. *People v. Neumann*, 499 N.E.2d. 487 (Ill. App. Ct. 1986), *Appeal denied*, 505 N.E.2d 359 (Ill.), *and cert. denied*, 481 U.S. 1051(1987).

concluding that the law was adequately developed and that the facts were reasonably available to petitioner prior to the end of his state proceedings. Accordingly, the district court did not discuss whether petitioner had showen prejudice. The only issue on appeal is whether the district court erred in concluding that petitioner had failed to show sufficient cause for his default.

First, we address the district court's conclusion that the legal authority for petitioner's claim was sufficiently established at the time of petitioner's state court proceedings. As the district court noted, *Swain v. Alabama*, 380 U.S. 202 (1965), which was decided approximately eighteen years prior to petitioner's trial, held that criminal defendants had an equal protection right to not have African-Americans systematically excluded from juries through the use of preemptory strikes. Later, in *Peters v. Kiff*, 407 U.S. 493 (1972) (plurality opinion), the bringing of cross-racial discrimination claims in the jury selection context was approved. *See also United States v. Gometz*, 730 F.2d 475 (7th Cir.) (en banc), *cert. denied*, 469 U.S. 845 (1984). Petitioners concedes that these preexisting precedents would have provided support for his claim, but he claims that this authority was not "as clear" as it later became.

Be that as it may, we believe that these authorities were "clear enough" at the time of petitioner's state court proceedings. The further refinements which have taken place in this area may

have helped to more clearly establish petitioner's claim, but we nonetheless conclude that all of the essential legal ingredients were in existence beforehand: *Swain* outlawed systematic discrimination in the jury selection process, thereby providing petitioner with a sufficient legal basis to support his claim; *Peters* allowed white individuals to brings such claims when blacks were wrongfully excluded, thereby conferring standing upon petitioner to raise this claim. Therefore, we uphold the district court's conclusion that federal law provided petitioner with a sufficient legal basis for relief.

Second, we address the district court's conclusion that the evidence submitted in support of this petition was reasonably available prior to the end of petitioner's state court proceedings. As factual support for his claim, petitioner offers the affidavits of a number of local attorneys. These affidavits state that, at the time of petitioner's trial, it was common practice in Cook County to exclude African-Americans from jury panels. More importantly, the affiants further state that they "believed *then and now* that racial discrimination was the reason for the practice" (emphasis added).

The district court concluded, and we agree, that this language demonstrates that this evidentiary material was reasonably available at the time of petitioner's state court proceedings. Petitioner argues that the systematic nature of the

discrimination was not sufficiently obvious, despite the personal observations of petitioner's trial counsel. This argument is unavailing.

> We have long recognized... that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim. Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default.

Engle v. Isaac, 456 U.S. 107, 134 (1982) (footnote omitted).

We have also considered and rejected petitioner's other arguments. Accordingly, we affirm the decision of the district court.

AFFIRMED.

B1

UNITED STATES OF AMERICA ex rel

LAWRENCE NEUMANN,

Petitioner,

v.

THOMAS PAGE, Warden, Menard

Correctional Center,

Respondent,[1]

No. 94 C 3498

United State District Court, Northern District of Illinois

Eastern Division

MEMORANDUM OPINION AND ORDER

Petitioner Lawrence Neumann, an Illinois state prisoner, seeks habeas corpus relief pursuant to 28 U.S.C. §2254. Neumann

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[1] Rule 2 of the Rules Governing Section 2254 Cases provides that the proper party respondent in habeas corpus actions brought by a currently incarcerated person is the state officer having custody of the petitioner. Petitioner named both his warden and the Attorney General of the State of Illinois as party respondents. As the Attorney General of the State of Illinois is not petitioner's custodian for the purpose of 28 U.S.C. 2254, he is incorrectly named as a party respondent and is hereby dismissed from this action. Thomas Page, Warden of the Menard Correctional Center, remains as the sole proper party respondent. See Reimnitz v. State Attorney of Cook County, 761 F.2d 405, 408 (7th Cir. 1985).

alleges that, during jury selection at his trial, the state prosecutor exercised peremptory challenges in a discriminatory manner. As such, Neumann contends that the state violated the Sixth Amendment's guarantee to a petit jury composed of a fair cross section of the community (incorporated through the Fourteenth Amendment) and the Fourteenth Amendment's Equal Protection Clause. Respondent answers that petitioner's application is procedurally defaulted and insufficient on the merits. For the reasons set forth below, Neumann's petition is denied with prejudice.

I. BACKGROUND

Petitioner was tried by jury in the Circuit Court of Cook County, Criminal Division (Case No. 82 I 9855), for the September 25, 1979, murder of Robert Brown. On September 16, 1983, petitioner was convicted of murder, murder while committing armed robbery, and murder while committing burglary. Petitioner was sentenced to natural life imprisonment, and is currently in the custody of Thomas Page, Warden of the Menard Correctional Center, Menard, Illinois.

Following his conviction, petitioner appealed to the Illinois Appellate Court, contending that: "(1) the trial court erred in denying his petition for discharge based on the denial of his right to a speedy trial; (2) the trial court erred in failing to

disqualify itself from defendant's retrial after the original proceeding was declared a mistrial; (3) the State failed to prove defendant guilty of murder beyond a reasonable doubt; (4) the trial court erred in admitting certain evidence and excluding other evidence about the State's key witness...; and (5) the prosecutor's remarks during closing and rebuttal arguments were prejudicial and constituted reversible error." *People v. Neumann*, 148 Ill. App. 3d 362, 365, 499, N.E. 2d 487, 489 (1st Dist. 1986). The Illinois Appellate Court rejected each of petitioner's claims, thereby affirming his convictions and sentence. The appellate court initially decided the case August 27, 1986, and denied a petition for rehearing on November 12, 1986.

Petitioner subsequently filed a Petition for Leave to Appeal to the Illinois Supreme Court, raising four of the five aforementioned issues. On February 6, 1987, the Illinois Supreme Court denied petitioner leave to appeal. *Petitioner v. Neumann*, 113 Ill. 2d 581, 505 N.E.2d 359, *cert denied*, 481 U.S. 1051, 107 S. Ct. 2184 (1987). Petitioner failed to seek state post-conviction relief pursuant to 725 ILCS 5/122-1 through 122-8, and now acknowledges that he may no longer file for state post-conviction relief as the statutory limitation period has expired. 725 ILCS 5/122-1.

Petitioner brings the instant application for a writ of habeas corpus, asserting a single ground for relief. Petitioner contends he was deprived of a fair trial by the systematic exclusion of African-Americans from his petit jury pursuant to *Swain v. Alabama*, 380 U.S. 202, 85 S. Ct. 824 (1965). Specifically, petitioner alleges that, during the jury selection process, the prosecutor forewarned petitioner's defense attorney of the prosecutor's intention to challenge and excuse all African-Americans sitting in the jury venire. Petitioner further alleges that the prosecutor in fact did use his peremptory challenges to excuse eleven African-Americans. Finally, petitioner contends that, at the time of his trial, Cook County prosecutors commonly and systematically used peremptory challenges to dismiss potential jurors based on their race.

In support of his allegations, petitioner offers the signed affidavit of Mr. Adam Bourgeois, petitioner's attorney at trial, and the signed affidavits of a number of local criminal defense attorneys.[2] In his affidavit, Mr. Bourgeois attests to the alleged statement made by the prosecutor prior to jury selection. Additionally, Mr. Bourgeois and the eleven local criminal defense attorneys allege that it was common practice, at the time of petitioner's trial, for Cook County prosecutors to exclude African

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2 All of the local criminal defense attorneys submitting affidavits are licensed to practice in the State of Illinois and have practiced in Cook County for a number of years.

Americans from jury service based solely on their race. Petitioner further notes that Mr. Bourgeois unsuccessfully objected to the prosecutor's challenged during the jury selection process, arguing that they were "racist in design and motivation." (State R. at B-448; Habeas R. at 509).

Petitioner admits that he failed to bring his current claim to the highest Illinois court. Petitioner, however, contends that he can show sufficient cause and prejudice to excuse his procedural default. Most importantly, petitioner, a caucasian man, allerges that he lacked the requisite standing to raise a *Swain* challenge at the time of his trial and appellate proceedings and that such now constitutes sufficient cause to excuse his default. Petitioner further states that he has made a sufficient preliminary showing with respect to his claim, and asks this court to schedule a hearing through which he may expand upon his factual allegations and resolve his claim on the merits.

Respondent urges this court to dismiss petitioner's writ as procedurally defaulted and as insufficient on the merits. Respondent states that petitioner failed to properly present his claims in state court proceedings and that he has failed to establish cause for such default or prejudice resulting therefrom. Respondent further contends that the case law in effect at the time of petitioner's trial and appellate proceedings clearly provided petitioner with a valid constitutional argument in relation to the

prosecutor's alleged discriminatory conduct. Similarly, respondent contends that petitioner's current factual argument was available at the time of petitioner's trial and appellate proceedings.

As for the merit of petitioner's claim, respondent asserts that petitioner has failed to set forth a sufficient factual basis to support his cause of action. Respondent specifically contends that petitioner's complaints, the affidavit of petitioner's counsel, and the supporting affidavits of local attorneys lack significant factual detail. Notwithstanding the factual or legal sufficiency of petitioner's attached affidavits, respondent further contends that the record in this case does not support petitioner's claim.

II. DISCUSSION

A. Waiver

Neumann brings his petition pursuant to 28 U.S.C. §2254, the federal habeas corpus provision for state prisoners. As such, this court may consider the merits of Neumann's habeas corpus petition only after ensuring that Neumann has overcome the two procedural hurdles of exhaustion and procedural default. Id.; *Coleman v. Thompson*, 501 U.S. 722, 731, 111 S. Ct. 2546, 2554-55 (1991); *Jones v. Washington*, 15 F.3d 671, 674 (7th Cir.), *cert. denied*, 114 S. Ct. 2753 (1994).

1. **Exhaustion of State Court Remedies**

A state prisoner normally must exhaust all available state judicial remedies before a federal court will hear a petition for habeas corpus. *Coleman*, 501 U.S. at 731, 111 S. Ct.at 2554-55; *Picard v. Connor*, 404 U.S. 270, 275, 92 S. Ct. 509, 512 (1971); *White v. Peters*, 990 F.2d 338, 341 (7th Cir. 1993). This exhaustion requirement, codified in the federal habeas statute itself, gives states the intial opportunity to correct any violations of prisoners' federal rights. 28 U.S.C. §2254(b); *Coleman*, 501 U.S. at 731, 111 S. Ct.at 2555; *Nutall v. Greer*, 764 F.2d 462, 463 (7th Cir. 1985). However, the exhaustion requirement applies only to remedies available at the time the habeas petition is filed. *Verdin v. O'Leary*, 972 F.2d 1467, 1483 (7th Cir. 1992); *United States ex rel. Johnson v. McGinnis*, 734 F.2d 1193, 1196 (7th Cir. 1984). Thus, a petitioner seeking habeas corpus relief has exhausted his available state court remedies if he has procedurally defaulted his federal claims in the state court system. *Coleman*, 501 U.S. at 731-32, 111 S. Ct.at 2555. Respondent has conceded here that petitioner has exhausted all of his available state remedies.

2. **Procedural Default**

While a habeas corpus petitioner may have exhausted all of his state court remedies prior to filing for habeas review in the federal court system, the petitioner's constitutional claims may yet

be barred from federal review if such exhaustion resulted from petitioner's procedural default of the claims. Habeas petitioners can default constitutional claims when they fail to raise the claims during the course of their state judicial proceedings or when they fail to take they claims to the highest state court. *Murray v. Carrier*, 477 U.S. 478, 488-89, 106 S. Ct. 2639, 2645-46 (1986); Jones, 15 F.3d.at 675.

The rules relating to the procedural defaults of habeas claims are, like the rules related to the exhaustion requirement, "grounded in principles of comity." See *Coleman*, 501 U.S. at 731-32, 111 S. Ct.at 2555. Federal courts acknowledge that the states should have the first opportunity to address alleged violations of state prisoners' federal rights. *Id.* Furthermore, the federal courts acknowledge that a habeas corpus petitioner's failure to raise a claim during state court proceedings "reduces the finality of appellate proceedings, deprives the appellate court of an opportunity to review trial error, and 'undercut[s] the State's ability to enforce its procedural rules'." *Murray*, 477 U.S. at 491, 106 S. Ct. at 2647 (quoting *Engle v. Isaac*, 456 U.S. 107, 129, 102 S. Ct. 1558, 1572 (1982)).

Federal law does, however, provide two exceptions to the general rule of procedural default. A habeas petitioner can overcome a procedural default by showing either (1) cause for the default and actual prejudice as a result of the alleged violation of federal law, or (2) that failure to consider the claim will result ina fundamental miscarriage of justice. *Coleman*, 501 U.S. at 749-50, 111 S. Ct. at 2564-65, *Mills v. Jordan*, 979 F.2d 1273, 1277 (7th Cir. 1992).

A review of the record demonstrates that petitioner failed to raise a jury discrimination claim, or a claim even remotely resembling such, during the pendency of his direct appeal. In fact, petitioner acknowledges that he did not raise such a claim on direct appeal or through Illinois statutory post-conviction review. Petitioner contends, however, that his default of the claim is now overcome by an adequate showing of cause and prejudice for such procedural failures. Petitioner does not contend that the fundamental miscarriage of justice exception excuses his waiver of the constitutional claim, and this court accordingly will not address such a possibility.

B. Cause for Procedural Default

In order to demonstrate cause for a procedural default, a habeas corpus petitioner must show that counsel's effort to comply with a procedural rule were impeded by some objective, external

factor, resulting in counsel's failure to preserve or raise the issue. *Murray*, 477 U.S. at 488, 492, 106 S. Ct. at 2645, 2647-48. Objective factors that constitute cause include "interference by officials" that makes compliance with the State's procedural rule impracticable, and "a showing that the factual or legal basis for a claim was not reasonably available to counsel." *McClesky v. Zant*, 499 U.S. 467, 493-94, 111 S.Ct.1454, 1470 (1991) (quoting *Murray*, 477 U.S, at 488, 106 S. Ct. at 2615).

1. **Availability of Legal Basis**

Petitioner contends that a number of factors constitute sufficient cause to excuse his procedural default. Most significantly, however, petitioner alleges that the factual and legal bases for his claim were not reasonably available to his counsel at the time of his trial and appellate proceedings. Petitioner's arguments lack merit for the foregoing reasons.

At the time of petitioner's trial and state court appeals, federal law provided petitioner with a sufficient legal basis for relief. In fact, the Supreme Court confronted the very issue presented by petitioner in 1965, roughly eighteen years prior to petitioner's state trial. See *Swain v. Alabama*, 380 U.S. 202, 85 S. Ct. 824 (1965). In *Swain*, the Court acknowledged that criminal defendants could establish equal protection violations by (1) presenting proof of the systematic exclusion of African-Americans

through the use of peremptories over a period of time, and (2) presenting similar proof regarding race-based exclusions through the use of peremptories at the defendant's own trial. Id. at 227-28, 85 S. Ct.at 839-40.

Later, in *Batson v. Kentucky*, 476 U.S. 79, 95-96, 106 S. Ct. 1712, 1722 (1986), the Court overruled *Swain* to the extent that it foreclosed a defendant from raising an equal protection challenge based solely upon the state's use of peremptories at his own trial. Shortly after *Batson* was decided, the Court held that it could be applied retroactively only to cases, state or federal, that were not final at the time of the *Batson* decision. The Court defined "final" to mean a case "where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed'"prior to the *Baston* decision. *Allen v. Hardy*, 478 U.S. 255, 257-58, 258 n.1, 106 S. Ct. 2878, 2879-2880, n.1 (1986) (citation omitted).

Furthermore, the law in effect at the time of petitioner's trial and initial appellate proceedings allowed a criminal defendant to raise his own challenge to racial exclusion in the petit jury regardless of the fact that his race different from the race of the excluded prospective jurors. See *Peters v. Kiff*, 407 U.S. 493, 92 St. Ct. 2163 (1972) (plurality). Although the Court failed to produce a majority opinion in *Peters*, six Justices "agreed that racial discrimination has no relevance to his or her standing to

raise the claim." *Powers v. Ohio*, 499 U.S. 400, 409, 111 S. Ct. 1364, 1369 (citing *Peters*, 407 U.S. at 504-505, 92 S. Ct. at 2169-2170) (opinion of Marshall, J.); *id.* at 506-507, 92 S. Ct. at 2170-2171 (White, J., concurring in judgment)).

In any event, any supposed discrepancy as to the status of the standing issue did not, after 1984, exist in this jurisdiction. The United States Court of Appeals for the Seventh Circuit held in 1984 that a white defendant had standing to challenge discrimination against African-Americans in the jury selection procedure. *United States v. Gometz*, 730 F. 2d 475, 478 (7th Cir. 1984) (*en banc*) (citing *Peters*, 407 U.S. at 498-500, 92 S. Ct. At 2166-67), *cert. denied*, 469 U.S. 845, 105 S. Ct. 155 (1984). Instructive is the *Gometz* court's rather quiet citation of *Peters* for that proposition.

Petitioner, in the memorandum supporting his habeas corpus petition, acknowledged the existence of the aforementioned precedent and relied upon such as a basis for relief. In fact, petitioner adamantly argued that the *Peters* and *Gometz* decisions were directly applicable to his situation., Petitioner stated in his memorandum that "[i]n *Peters*,...[t]he Supreme Court held a white man had standing to raise a systemic challenge even though the discrimination was being practiced against another race." (Defendant's [Petitioner's] Memorandum in Support of Habeas Petition at 3).

However, Petitioner now disavows the precedential value of *Peters* and *Gometz* in his reply to respondent's answer. Petitioner currently contends that he did not have the requisite standing to raise a *Swain* challenge at the time of his trial. In fact, petitioner now states that "it was not until 1991 that the Supreme Court held that a while man could challenge the exclusion of African-Americans from the jury panel," citing *Powers*. (Plaintiff's [Petitioner's] Response to Defendant's Answer to Habeas Petition at 2). Petitioner contends that his alleged lack of standing constitutes cause sufficient to excuse his procedural default.

Petitioner was right the first time; he had the requisite standing to raise his current challenge during the pendency of his state court proceedings. The *Swain* case provided petitioner, at the time of his trial and initial appellate proceeding, with a sufficient legal basis to support his current claim, and the *Peters* and (less so, because of timing) *Gometz* cases clearly provided petitioner with the requisite standing to raise such a claim at the time of his trial and initial appellate proceedings.

The law of cross-racial standing, not to say the law regarding racialist peremptory challenges in general, developed in the case of *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986). The *Batson* case removed the requirement that a defendant show systematic exclusion in addition to exclusion in his particular

trial. After *Batson*, "a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial." Id. at 96, 106 S Ct. at 1723. In articulating the requirements for a new *Batson* claim, the *Batson* court at the very least strongly suggested that the defendant must be of the same "cognizable racial group" as the excluded juror to assert a claim of actionable race bias in that defendant's jury selection based on evidence solely from his trial. *Id*; *see also Holland v. McGinnis*, 963 F.2d 1044, 1053 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1053 (1993). *Powers* in 1991 allowed cross-racial standing in *Batson* claims. *Powers*, 499 U.S. at 409, 111 S. Ct. at 1369. *Powers* is not available to give Neumann a *Batson* claim here, since his direct appeal was long final when the "new rule" in *Powers* came down. *Holland*, 963 F. 2d. at 1053-55. But remaining to consider is whether *Batson* effects the analysis of the availability of a *Swain*-type claim to Neumann during his state direct appeal. *Batson* was decided April 1986; the Illinois Appellate Court affirmed Neumann's conviction initially in August 1986 and denied rehearing in November 1986.

One fundamental point here is that *Swain*-claim cross-racial standing and *Batson*-claim cross-racial standing have two different histories. *Batson*-claim cross-racial standing did not arrive until *Powers*. *Swain*-claim cross-racial standing is traced to

the Supreme Court's *Peters* decision. There are two sources of support for assigning a meaningful distinction to the cross-racial standing histories of *Batson* and *Swain* claims. First, *Batson*, in articulating a test that would exclude cross-racial standing, did not come to grips either with *Peters* or any circuit court cases reading *Peters* as approving cross-racial standing for *Swain* claims, suggesting it did not need to come to grips with those cases because they applied to a different sort of claim. Second, the *Powers* decision used as a basis for its *Batson*-claim analysis the *Peters* analysis on *Swain* claims: "In *Peters v. Kiff*, 407 U.S. 493, 92 S. Ct. 2163 (1972), Justice White spoke of 'the strong statutory policy of §243, which reflects the central concern of tthe Fourteenth Amendment.' *Id.*, at 507, 92 S. Ct. at 2170 (concurring in judgment). The Court permitted a white defendant to challenge the systematic exclusion of black person from grand and petit juries." *Powers*, 499 U.S. at 408, 111 S. Ct. at 1369.[3] Viewed as such, *Batson's* implicit rejection of cross-racial standing for *Batson*-type claims is not directly relevant to the history of *Swain*-type claims.

Additionally, leaving aside any distinctions in the history of cross-racial standing, it would be hard to categorize *Batson* on standing as the "cause" of Neumann's default. It is not as if

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[3] Of course, because of the timing here, on this point *Powers* is guidance, not precedent.

Neumann, bolstered by *Peters* (and later by *Gometz*), had been pressing a systematic exclusion claim when *Batson* came along and caused him to withdraw his jury-selection objections. The jury selection issue was nowhere to be seen on direct appeal. And since the jury selection issue he could press now (systematic exclusion plus exclusion in his trial) was reasonably available at the state court level, that claim is defaulted.

In sum, sufficient legal based were available to petitioner and his counsel at the time of petitioner's state proceedings. This court cannot conclude that some external, objective factor resulted in petitioner's failure to preserve or raise his current legal claim during his state court proceedings.

2. **Availability of Factual Basis**

Petitioner next contends that he was unable to introduce evidence of systematic racial discrimination at trial because such information was not available or known to him at the time of his trial. Similarly, petitioner states that "the record did not contain systematic information which could have permitted review on direct appeal." (Petition for Writ of Habeas Corpus at 8, ¶13.) Finally, petitioner contends that such information was outside of the scope of appropriate trial issues and that it was unlikely that the trial could would have entertained such a challenge during the course of his trial. Petitioner argues that these factors constitute

sufficient cause to excuse procedural default.

The factual argument petitioner now asserts was similarly available at the time of his state proceedings. Therefore, petitioner now wishes to introduce facts that were not introduced during state proceedings. But petitioner fails to identify any facts existing now that were not in existence at the time he was proceeding in the Illinois state courts.

The affidavits submitted by petitioner, including that of petitioner's trial and appellate counsel (now petitioner's counsel on habeas review), contradict petitioner's factual argument. In fact, the affidavits allege that facts relating to the state's systematic use of race-based peremptory strikes were available at the time petitioner was pursuing state court relief. Specifically, each affidavit states that "*at that time*, it was *very common* for the prosecutors in Cook County to exclude African Americans from juries. I believed *then* and now that racial discriminations was the reason for the practice." (*emphasis added*).

Evidence of systematic racial discrimination was as readily available to petitioner at the time of his trial as it is today. Petitioner's trial counsel should have attempted to gather and introduce into the record evidence of systematic discriminations during the course of petitioner's trial. In fact, in conjunction with his objection challenging the jury selection, petitioner's counsel could have sought leave to introduce evidence that would meet the

Swain standard. *United State ex. rel. Allen v. Hardy*, 583 F. Sup. 562 (N.D. Ill. 1984), *denial of certificate of probable cause affirmed sub. nom. Allen v. Hardy*, 478 U.S. 255, 106 S. Ct. 2878 (1986). At that point the state judge could have addressed the issue in any of several ways. For example: counsel "might have been granted a continuance to gather evidence on systematic exclusion" of potential jurors, or counsel "might have made an offer of proof and proceeded with the trial." *Id.* at 563.

Had petitioner objected to the state's use of its peremptory strikes, the issue would have been within the scope of appropriate trial issues to be addressed by the court. Petitioner cannot seriously argue that the trial court was "unlikely" to have entertained an attempt to introduce evidence into the trial record when petitioner in fact failed to even attempt such. At the very least, the trial court was obligated to allow petitioner to make an offer of proof with respect to the existence of systematic exclusion. Petitioner failed to make such an offer of proof. This court cannot conclude that some external "objective" factor resulted in petitioner's failure to preserve or raise his current factual claim during the pendency of this state court proceedings.

Overall then, petitioner fails to demonstrate cause sufficient to overcome petitioner's procedural default. The mere fact that petitioner's counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it,

does not constitute cause for procedural default. See *Engle v. Isaac*, 456 U.S. at 133-34, 102 S. Ct. at 1575. Petitioner does not present a compelling case for overriding the general principle that a federal court should intrude in a state's criminal process when the state's highes court has not had an opportunity to rule on the constitutional issue presented.[4]

III. Conclusion

Lawrence Neumann's petition for writ of habeas corpus is denied with prejudice.

Date: April 21, 1995

s/ James H. Alesia
United States District Judge

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[4] A court need not examine prejudice if cause is not demonstrated. *MacDougall v. McCaughtry*, 951 F.2d 822, 825 (7th Cir.1992). As petitioner has not demonstrated cause for his procedural failures in regard to the present action, this court will not address the issue of prejudice.

STATE ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT

Adam Bourgeois, being first duly sworn, does hereby state and depose as follows:

1. My name is Adam Bourgeois.
2. I am an African American attorney licensed to practice in the State of Illinois.
3. I have practiced law in Cook County Illinois for over 40 years.
4. I represented Larry Neumann when he was tried for the crimes for which he was now incarcerated.
5. During the jury selection process in the second trial, the prosecutor specifically stated to me that he was going to exclude African Americans from Neumann's jury. The prosecutor in fact exercised his challenges in this fashion, and Neumann was tried by a jury which did not include any African Americans.
6. I was very active in the Cook County Criminal Courts during the time when Neumann's case was tried.

7. I was very sensitive to and very aware of the treatment of potential African American jury members because of my own race and prior experiences

8. At that time, it was very common for the prosecutors in Cook County to exclude African Americans from juries. I believed then and now that discrimination was the reason for the practice.

9. For these reasons, I further believe that the exclusionary practice used by the prosecutor in Neumann's case was representative of the methods used in the great majority of criminal cases tried at that time.

Further affiant saith not.

s/ Adam Bourgeois

Subscribed and sworn before me
this 31 day of May, 1994.
s/ Rena Bowman
Notary Public
My commission expires: April 6, 1998

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT

Frank Edwards, being first duly sworn, does hereby state and depose as follows:

1. My name is Frank Edwards.
2. I am an African American attorney licensed to practice in the State of Illinois.
3. I have practiced law in Cook County, Illinois for a number of years.
4. I was very active in the Cook County Criminal Courts during the year 1983.
5. I was very sensitive to and very aware of the treatment of potential African American jury members because of my own race and prior experiences.
6. On the basis of my own personal experience I can state that at that time, it was very common for the prosecutor in Cook County to exclude African Americans from juries. I believed then and now that racial discrimination was the reason for the practice. The effect of this practice was systemic exclusion of man African Americans from the jury experience.

Further affiant saith not.

s/ Frank Edwards

Subscribed and sworn before me
this 26th day of May, 1994.
s/ Eloise P. Sharkey
Notary Public
My commission expires: January 14, 1998

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT

Edward M. Genson, being first duly sworn, does hereby state and depose as follows:

1. My name is Edward M. Genson.
2. I am an attorney licensed to practice in the State of Illinois.
3. I have practiced law in Cook County, Illinois for a number of years.
4. I was very active in the Cook County Criminal Courts during the year 1983.
5. I was very sensitive to and very aware of the treatment of potential African-American jury members.
6. On the basis of my own personal experience I can state that at that time, it was very common for the prosecutors in Cook County to exclude African Americans from juries. I believed then and now that racial discrimination was the reason for the practice. The effect of this practice was a systemic exclusion of many African Americans from the jury experience.

Further affiant saith not.

s/ Edward M. Genson

Subscribed and sworn before me

this 1st day of June, 1994.

s/ Aleta Winters

Notary Public

My commission expires: May 24, 1995

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT

Adam Bourgeois, Jr., being first duly sworn, does hereby state and depose as follows:

1. My name is Adam Bourgeois, Jr.
2. I am an attorney licensed to practice in the State of Illinois.
3. I have practiced law in Cook County, Illinois for a number of years.
4. I was very active in the Cook County Criminal Courts during the year 1983.
5. I was very sensitive to and very aware of the treatment of potential African-American jury members.
6. On the basis of my own personal experience I can state that at that time, it was very common for the prosecutors in Cook County to exclude African Americans from juries. I believed then and now that racial discrimination was the reason for the practice. The effect of this practice was a systemic exclusion of many African Americans from the jury experience.

Further affiant saith not.

s/ Adam Bourgeois, Jr.

Subscribed and sworn before me
this 26th day of May, 1994.
s/ Eloise P. Sharkey
Notary Public
My commission expires: January 16, 1998

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT

Donald Hubert, being first duly sworn, does hereby state and depose as follows:

1. My name is Donald Hubert.
2. I am an attorney licensed to practice in the State of Illinois.
3. I have practiced law in Cook County, Illinois for a number of years.
4. I was very active in the Cook County, Illinois for a number of years.
5. I was very sensitive to and very aware of the treatment of potential African-American jury members.
6. On the basis of my own personal experience I can state that at that time, it was very common for the prosecutors in Cook County to exclude African Americans from juries. I believed then and now that racial discrimination was the reason for the practice. The effect of this practice was a systemic exclusion of many African Americans from the jury experience.

Further affiant saith not.

s/ Donald Hubert

Subscribed and sworn before me

this 31st day of May, 1994.

s/ Allen Jackson

Notary Public

My commission expires: May 28, 1995

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT

Jeffery B. Steinback, being first duly sworn, does hereby state and depose as follows:

1. My name is Jeffery B. Steinback.
2. I am an attorney licensed to practice in the State of Illinois.
3. Although my practice is more federally oriented now, I have practiced law in Cook County, Illinois for a number of years.
4. I was very active in the Cook County, Illinois for a number of years. I also have appellate experience in this area.
5. I was very sensitive to and very aware of the treatment of potential African-American jury members.
6. On the basis of my own personal experience I can state that at that time, it was very common for the prosecutors in Cook County to exclude African Americans from juries. I believed then and now that racial discrimination was the reason for the practice. The effect of this practice was a

systemic exclusion of many African Americans from the jury experience.

Further affiant saith not.

s/ Jeffery B. Steinback

Subscribed and sworn before me
this 1st day of June, 1994.
s/ Carol L. Purchase
Notary Public
My commission expires: March 12, 1998